93-901

Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM D. WEST,
Cross-Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state law claim for punitive damages against an airline preempted under the rationale of *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992)?

PARTIES TO THE CASE

All parties to the case appear in thc caption. When this case was first in the court of appeals, American Airlines and Trans World Airlines sought leave to file briefs as *amici curiae* in support of cross-respondent Northwest Airlines' petition for rehearing and suggestion for rehearing *in banc*, but their motions were denied.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

William D. West hereby cross-petitions the Court to review that portion of the judgment below which held that his claim for punitive damages under state tort and contract law is preempted by federal law. Cross-respondent Northwest Airlines has already petitioned the Court to review that portion of the judgment holding that Mr. West's state law claim for compensatory damages is not preempted. *Northwest Airlines, Inc. v. West,* No. 93-803.

OPINIONS BELOW

The unpublished opinion and order of the United States District Court for the District of Montana appears in the appendices to Northwest's petition in No. 93-803 ("Pet. App.") as Appendix L.

The United States Court of Appeals for the Ninth Circuit issued three opinions in this case:

The first opinion, issued on 11 September 1990 and withheld from publication pending a ruling on Northwest's rehearing petition, appears as Pet. App. F. An amended version of that opinion, issued on rehearing on 5 February 1991, appears as Pet. App. E and is reported at 923 F.2d 657 (9th Cir. 1991). Both parties then sought review in this Court, which granted both petitions, vacated the court of appeals' judgment and remanded for further consideration in light of *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). Pet. Apps. B, C, D. The court of appeals issued its third opinion -- the one at issue here -- on 3 June 1993; it appears as Pet. App. A is reported at 995 F.2d 148 (9th Cir. 1993).

JURISDICTION

The judgment of the court of appeals was entered on 3 June 1993. Northwest's rehearing petition and suggestion for rehearing *in banc* were denied on 20 August 1993 (Pet. App. G). Northwest's petition was timely filed on 18 November 1993, and this cross-petition is thus timely under Sup. Ct. R. 13.5. The Court has jurisdiction over both petitions under 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

Section 105(a)(1) of the Federal Aviation Act (the "Act"), as amended, 49 U.S.C. App. § 1305(a)(1)("section 105"), states:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

Section 1106 of the Federal Aviation Act, as amended, 49 U.S.C. App. § 1506 ("section 1106"), states:

> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Section 250 of Title 14 of the Code of Federal Regulations is a Department of Transportation rule which specifies an airline's obligation to passengers who are "denied boarding" or "bumped" from oversold flights. Section 250.9 states in relevant part:

> (a) Every carrier shall furnish passengers who are denied boarding involuntarily for flights on which they hold confirmed reserved space immediately after the denied boarding occurs, a written statement . . . .
>
> (b) The statement shall read as follows:
>
> * * *
>
> Passenger's Options
>
> Acceptance [by a bumped passenger] of the compensation [specified in this rule] may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

STATEMENT OF THE CASE

1. In October 1986 Mr. West was involuntarily "bumped" from an oversold Northwest flight. Mr. West was travelling on a non-refundable fare which did not allow him any flexibility to change his travel plans. Between the day he made his reservation and the date of the flight, however, Northwest switched from a 727 to a smaller DC-9 on the route in question, thus increasing the risk that Mr. West would be bumped. Northwest did not, however, advise him of this change (Pet. App. A-2).

When Mr. West arrived at the gate, the smaller aircraft was indeed oversold. Northwest offered him $198 in "denied boarding compensation," a form of liquidated damages which federal overbooking rules require an airline to offer involuntarily bumped passengers. 14 C.F.R. § 250.5. Mr. West rejected the offer, choosing instead to exercise an option specified in that rule, *viz.*, pursue remedies that are available under state law (Pet. App. A-2). *See* 14 C.F.R. § 250.9(b).

2. In May 1987 Mr. West sued Northwest in Montana state court, and Northwest removed the case to federal district court

based on diversity of citizenship. In his complaint, Mr. West alleged that his bumping was unfair discrimination under federal law and that Northwest had breached an implied covenant of good faith and fair dealing, in violation of Montana law (Pet. App. A-2).

The district court granted Northwest's motion for summary judgment. The court began by rejecting Mr. West's federal discrimination claim, a ruling not pursued on appeal. The court did not reach the merits of Mr. West's state law claim, however, finding that it was expressly preempted by section 105 of the Federal Aviation Act, which preempts state laws "relating to rates, routes, or services" of air carriers. 49 U.S.C. App. § 1305(a)(1). The court read section 105 broadly as holding that Congress "intended to preempt all state statutes and common law rules which affect rates or services involving air travel" (Pet. App. L-6 - L-7).

3. The court of appeals reversed (Pet. App. F), holding that section 105 "preempts claims only when the underlying statute or regulation itself relates to airline services" (Pet. App. F-5). Thus, state laws that single out airlines or transportation or companies for special treatment are preempted, the court reasoned, although not laws of general applicability such as Mr. West's common law claim that Northwest breached its implied covenant of good faith and fair dealing (Pet. App. F-5 - F-6). Northwest's claims of implied and conflict preemption were also rejected (Pet. App. F-6 - F-7).

Northwest sought rehearing, and in February 1991 the panel issued an amended opinion which affirmed in part and reversed in part (Pet. App. E). The amended opinion was identical to the earlier opinion insofar as it held that Mr. West's claim for compensatory damages was not preempted by section 105. The panel reversed itself, however, on an issue which Northwest did not specifically address in its brief or its petition for rehearing: The court added a paragraph to its opinion stating that Mr. West's claim for punitive damages was preempted because it conflicted with federal overbooking rules. The court reasoned that an award of punitive damages would punish Northwest for deliberately overselling its flights, even though that practice is sanctioned under the federal overbooking rules (Pet. App. E-7). Mr. West sought rehearing, arguing that his punitive damages claim focused on Northwest's failure to provide him with adequate notice, not the act of over-

booking, but the petition was denied (Pet. App. I).

4. Both parties then sought certiorari (Nos. 91-505 and 91-734), and those petitions were pending at the same time that the Court was being asked to consider *Morales* (No. 90-1604). The Court granted review in *Morales* and issued its opinion in that case in June 1992; it then granted both petitions in this case, vacated the judgment below and remanded for further consideration in light of *Morales*. 112 S. Ct. 2932, 2986 (1992)(Pet. Apps. B, C, D).

5. On remand, the court of appeals reaffirmed its prior conclusions, though by a different route in light of *Morales* (Pet. App. A). Regarding Mr. West's compensatory damages claim, the court of appeals noted that *Morales* gave section 105 a broad reading, consistent with Congress's intent "to preempt state laws which interfered with the goal of deregulation of the airline industry" (Pet. App. A-4). But *Morales* did not eliminate state law remedies entirely, the appeals court noted, citing *Morales*' observation that some state laws would "relat[e] to" airline rates or services at some abstract level, but "they would do so "'in too tenuous, remote, or peripheral a manner' to have preemptive effect." *Morales, supra*, 112 S. Ct. at 2040, *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 (1983)(Pet. App. A-5).

The court of appeals concluded that Mr. West's claims under state tort or contract law fall into this latter category. In reaching this conclusion, the court looked to the federal rules implementing the Federal Aviation Act, specifically the overbooking rules (14 C.F.R. Part 250), which give passengers three choices if they are bumped: accept liquidated damages under a formula set forth in that rule; accept a free ticket for a future trip; or "decline the payment and seek to recover damages in a court of law or in some other manner," 14 C.F.R. § 250.9(b)(Pet. App. A-6).

The court of appeals determined that a finding of preemption would "eviscerate" a bumped passenger's right under these rules to pursue whatever state law remedies may be available, reasoning that the "plain language of the regulation indicates that passengers retain the option . . . of pursuing *compensatory* damages in state court," although the word "compensatory" appears nowhere in the text of the overbooking rule (Pet. App. A-7)(emphasis in original).

The court then turned to the issue of punitive damages, holding (without citation of authority) that they were preempted: "Since punitive damages by their very nature seek to punish the entity against whom they are awarded, such damages awarded in response to bumping resulting from airline overbooking would be contrary to the goals of deregulation" (Pet. App. A-7). Moreover, "[o]verbooking and bumping are accepted forms of price competition and reduction in the deregulation period," and thus "any law or regulation which results in penalizing airlines for these practices is preempted by" federal law (Pet. App. A-7).

One judge dissented in part, concluding that Mr. West's claim for compensatory damages was also preempted under *Morales* (Pet. App. A-8 - A-10). Northwest's petition for rehearing was denied, and its suggestion for rehearing *in banc* was rejected with no judge seeking a vote on the suggestion (Pet. App. G-1).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW FINDING PREEMPTION OF PUNITIVE DAMAGES CLAIMS SHOULD BE CONSIDERED IN TANDEM WITH ANY REVIEW OF THE RULING ON COMPENSATORY DAMAGES.

Northwest's petition asks the Court to artificially split the preemption issue in this case and to consider only that portion of the Ninth Circuit's ruling which held that claims for compensatory damages against an airline are not preempted by section 105. Our brief in response to that petition addresses Northwest's specific points, and we do not repeat that discussion here. Our position is that if the Court grants Northwest's petition, it should also grant this cross-petition for two reasons: First, the punitive damages issue is as important as the compensatory damages issue raised by Northwest. Second, the Ninth Circuit's preemption analysis conflicts with prior rulings of this Court.

1. The question of whether passengers may seek punitive damages against an airline is of comparable importance to the compensatory damages issue, and it would be illogical to sever the two. A claim for punitive damages is invariably made in tandem

with a claim for compensatory damages, and the same set of facts often underlies both types of claims. Moreover, as this Court noted in rejecting an argument for preemption of punitive damages in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), "[p]unitive damages have long been a part of traditional state tort law," adding that under the statutory scheme there, "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted."

Thus, if the compensatory damages issue raised by Northwest is significant enough to warrant review, so is the companion issue regarding punitive damages, and a ruling on both would be of considerable utility to lower courts and to litigants. This case involves garden-variety tort and contract claims, which makes it fairly representative of the cases where section 105 preemption issues arise. By contrast, *Morales* involved an unprecedented effort by 34 attorneys general to use state laws to regulate airline advertising, which was already subject to federal standards and federal cease-and-desist remedies. 112 S. Ct. at 2039-40. *Morales* is thus of limited application in considering other types of state law claims, particularly when the claim is that a common law remedy "relates" not to an airline's "rates" or "routes," but to its "services."

Moreover, *Morales* acknowledged that not all state law remedies are preempted, but the Court saw no need to explain which laws are preempted and which ones survive because the states' effort to regulate airline advertising was not viewed as a "borderline" case. *Id.* at 2040. The fact that no border has been defined has created uncertainty here. As the Fifth Circuit put it, "until recently, no one even supposed that section 1305 preempts state tort claims," but airlines have now "begun to argue that various state-law tort claims are expressly preempted by section 1305, especially in the wake of *Morales*." *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352 (1993).

This case thus provides a good vehicle for giving guidance to courts when they are confronted with section 105 defenses in response to tort and contract claims. The brief we filed in response to Northwest's petition in No. 93-803 outlines (at 2-4) some of the reasons why *Morales* offers inadequate guidance for cases such as this one. In brief, *Morales* noted that preemption of state advertising laws would not leave passengers defenseless because airline

advertising practices are subject to federal regulation under section 411 of the Act (49 U.S.C. App. § 1381). 112 S. Ct. at 2040. Neither section 411 nor any other provision of that Act allows passengers to recover damages for tort or contract claims, however, as this Court recognized in *Nader v. Allegheny Airlines, Inc.* 426 U.S. 290, 302 (1976), which also involved the right of a bumped passenger to pursue state law claims for compensatory and punitive damages. And while *Morales* looked to ERISA preemption principles in deciding how to read the "relating to" language of section 105, ERISA preempted state laws at the same time it established a broad panoply of federal rights in their place, something Congress failed to do when it enacted section 105. Thus, this case raises more starkly than did *Morales* the issue of how to construe section 105 in light of the savings clause in section 1106 of the Federal Aviation Act, which was enacted in 1938, which Congress carried forward intact when it enacted section 105 in 1978, and which expressly preserves "the remedies now existing at common law or by statute."

For these reasons, the availability (*vel non*) of punitive damages in this area is as important as the compensatory damages point which Northwest asks the Court to consider.

2. Review is also warranted because of a tension between the ruling below and several rulings of this Court. The conclusion that punitive damages are preempted here is at odds with this Court's ruling in *Silkwood*, which held that punitive damages were not preempted by a federal law which made nuclear safety subject only to federal regulation and which imposed civil penalties on companies that violate federal safety standards. Acknowledging a tension between an award of punitive damages based on conduct which is directly regulated by federal law, *id.* at 256, the Court nonetheless found that such a result "would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." *Id.* at 257. Since *Silkwood*, the Court has rejected similar claims that federal laws preempt state damages remedies affecting areas covered by federal law. *Cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988); *English v. General Electric Co.*, 496 U.S. 72, 85-86 (1990); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

There is also a tension between the decision below and this Court's ruling in *Nader v. Allegheny Airlines, supra*. The heart of the court of appeals' reasoning here is that federal overbooking rules allow airlines to oversell their flights, from which fact the court deduced that an award of punitive damages to a bumped passenger would punish something which federal law allows. The problem with that reasoning is that Mr. West's claim focuses not on the act of overbooking, but inadequate notice that an important element of the contract had changed. This Court recognized that distinction in *Nader*, where a bumped passenger sought damages not to punish overbooking *per se*, but the practice of telling passengers they had a "confirmed" reservation when, in fact, they did not. *See* 512 F.2d 527, 551 (D.C. Cir. 1975). Thus, Northwest would be free to continue overbooking if Mr. West wins; indeed, Northwest would be economically foolish to abandon the practice, which protects airlines from "no-show" passengers by allowing them to fill otherwise empty seats. At most, a punitive damages award would affect what an airline tells its customers about whatever "services" it chooses to offer and what it tells them when it makes a significant change in those "services."

CONCLUSION

If the petition in No. 93-803 is granted, this cross-petition should also be granted.

Respectfully submitted,

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BRIEF IN RESPONSE TO CROSS-PETITION

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QUESTIONS PRESENTED

Where an air carrier has given a passenger written notice of possible overbooking, the text of which is mandated by the regulatory agency, is a state law claim for punitive damages alleging that the notice was not adequate preempted by Section 105 of the Federal Aviation Act, 49 U.S.C. App. §1305?

Is the state law claim for punitive damages preempted because it conflicts with the overbooking program of the Department of Transportation?

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BRIEF IN RESPONSE TO CROSS-PETITION

THE CROSS-PETITION SHOULD BE DENIED

This is the second time that Cross-Petitioner William West has petitioned this Court for the right to sue for punitive damages because he was bumped from an oversold Northwest Airlines' flight.[1] West's first petition requesting the same relief was denied by this Court in Docket No. 91-505 on June 8, 1992. See copy of the memorandum order

[1] Pursuant to Rule 29.1 of this Court, Cross-Respondent states that Northwest Airlines, Inc. does not have corporate parents or subsidiaries, the shares of which are publicly traded.

in the Appendix to Northwest's petition No. 93-803 at C-1. On the same day, this Court had granted the cross-petition of Northwest Airlines, vacated the judgment of the Ninth Circuit, and remanded in light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ____, 112 S.Ct. 2031 (1992) (*id.* at B-1). Thereafter, West's motion for rehearing correctly argued that, pursuant to Supreme Court Rule 13.5, this Court could not grant Northwest's cross-petition in No. 91-734 without granting West's petition in No. 91-505. This Court then vacated its June 8, 1992 order denying West's petition and granted *certiorari*, remanding that aspect of the case to the Ninth Circuit as well (*id.* at D-1).

The procedural reason which persuaded this Court to vacate its original denial of West's petition no longer exists. Because Northwest should not be liable for punitive damages for participating in a denied boarding program which was developed by the Civil Aeronautics Board and is currently regulated by the Department of Transportation, and because there is no conflict with any decision found in any similar situation, West's cross-petition should be denied.[2]

Cross-Petitioner West first argues that "it would be illogical" to sever his cross-petition seeking to recover punitive

---

[2] While Northwest believes that the Cross-Petition should be denied, both West and Northwest agree that Northwest's petition in No. 93-803 should be granted. In West's response in No. 93-803, he concedes that the decision by the Ninth Circuit below conflicts with decisions in the Fifth and Seventh Circuits (West Brief in No. 93-803 at 8). "[W]e submit that the lack of guidance provided by *Morales* and the varying approaches taken by lower courts in its wake argue in favor of granting review here" (*id.*). West further states that "A decision by this Court would thus provide important guidance on an issue which *Morales* did not address, *i.e.*, how precisely to identify which tort and contract claims are preempted by section [1305] and which ones are not" (*id.* at 1). Because of the "atypical set of facts" in *Morales* "additional guidance from this Court would be useful" (*id.* at 2). Northwest agrees that the issues presented are significant and that intervention by this Court is appropriate and necessary to resolve the present confusion.

damages in No. 93-901 from Northwest's petition in No. 93-803 concerning preemption of compensatory damages (Cross-Petition at 6). West does not consider, however, that the factual situation of this case is dramatically different from those in the cases he relies on. Here, the Department of Transportation has constructed a system of liquidated damages which, in its view, benefits both the travelling public and the airline industry. The system enables most passengers to breach, at will, their contract by deciding not to show up for their flights and then to use their tickets on the original or other airlines for transportation at another time without any cost to the passengers.[3] Recognizing that punitive damages are inappropriate in this federally regulated system, the court below found that: "Overbooking and bumping are accepted forms of price competition and [price] reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted by the FAA" (appendices to Northwest's petition in No. 93-803) ("Pet. App." at A-7).

Secondly, plaintiff seeks to merge tort claims with what is really a breach of contract claim to honor Mr. West's confirmed reservation. Not long ago, this Court discussed the importance of maintaining the distinctions between the law of contract and that of tort. In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295 (1986) the Court distinguished between liability under a warranty contract and tortious claims for products liability

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[3] There are, of course, certain airline fares in which the passenger agrees to pay a certain amount should that passenger decide not to take the flight. In exchange, the price of that ticket is significantly reduced. Mr. West was such a passenger. Upon his being denied boarding, Northwest offered to put him on a later flight that day and to pay him denied boarding compensation, both of which he refused. West chose to make the trip about two weeks later using the same ticket.

and negligence. There this Court acknowledged the concern that if product liability law "were allowed to progress too far, contract law would drown in a sea of tort" (476 S.Ct.866, 106 S.Ct. at 2300). Punitive damages would be inappropriate in any case.

Cross-Petitioner West argues at page 9 that he is not seeking punitive damages "to punish overbooking *per se*, but [rather to punish] the practice of telling passengers they had a 'confirmed' reservation when, if fact, they did not." In this case, however, Northwest included in Mr. West's ticket the notice mandated by 14 C.F.R. §250.11(b), "NOTICE-OVERBOOKING OF FLIGHTS." That notice warned that "Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation." This section, which came into effect in 1982 and was amended in 1984, was not in effect when this court decided *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). Nor was, of course, section 1305 which came into effect in 1978. *Nader*, therefore, is inapposite.

The recent decision by the Supreme Court of Illinois, *Wolens v. American Airlines, Inc.*, 1993 WL 518593 (Ill. 16 Dec. 1993) has no connection to a federally mandated program. Rather, the court held that Illinois state law, the basis of a class action protesting changes that American had made to its frequent flyer program, was not preempted by section 1305. *Wolens* does illustrate, however, the need to give further guidance concerning the application of section 1305.

None of the other cases cited in support of the cross-petition, *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992); *English v. General Electric Co.*, 496 U.S. 72 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); or *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), interprets the Federal Aviation Act. Moreover, and significantly, none involves a breach of contract situation where

the regulating authority has so carefully crafted the balance of rights and obligations, and has so meticulously drafted the exact text of the notice which appears on the ticket. In such circumstances the court of appeals was certainly correct in finding, as a matter of law, that a claim for punitive damages was wholly unwarranted and preempted.

CONCLUSION

As it did previously, this Court should deny West's cross-petition and grant Northwest's petition.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR CROSS-PETITIONER

Pursuant to Rule 15.7, cross-petitioner William D. West hereby advises the Court of a recent decision by the Illinois Supreme Court which was issued nine days after the filing of his cross-petition. As we explain below, this decision by a state supreme court conflicts with the court of appeals' ruling in this case over the issue of whether the Federal Aviation Act preempts an airline passenger's claim for punitive damages. The decision thus provides an additional reason to grant review of the cross-petition if the Court should decide to grant Northwest's petition.

In *Wolens v. American Airlines, Inc.*, 1993 WL 518593 (Ill. 16 December 1993), the Illinois Supreme Court held that section 105 of the Federal Aviation Act does not preempt a passenger's claims

against an airline for breach of contract and violation of Illinois' Consumer Fraud and Deceptive Business Practices Act, based on American's retroactive change in the rules for earning mileage credits in its frequent flyer program. The suit, filed as a class action, sought compensatory and punitive damages, as well as an injunction on behalf of the class to prevent application of the new rules to mileage credits earned prior to May 1988. Slip op. at 1.

American moved to dismiss the suit on the ground that section 105 preempted these claims. The trial court denied the motion, but certified that legal question to the Illinois Court of Appeals, which held that section 105 does preempt the request for injunctive relief, though not the damages claims. 207 Ill. App. 3d 35, 152 Ill. Dec. 16, 565 N.E.2d 258 (1990). The Illinois Supreme Court affirmed that ruling. 147 Ill. 2d 367, 168 Ill. Dec. 133, 589 N.E.2d 533 (1992). American then sought review in this Court, which granted the petition, vacated the judgment and remanded for further consideration in light of this Court's decision in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). *American Airlines, Inc. v. Wolens*, 113 S. Ct. 32 (1992).

In its recent decision on remand, the Illinois Supreme Court held that the damages claims could proceed notwithstanding *Morales*, reasoning that both the common law and statutory claims, insofar as they affected American's frequent flyer program, had too "tenuous, remote, or peripheral" an effect on American's "rates, routes, or services" to be preempted by section 105. *Morales, supra*, 112 S. Ct. at 2040 (internal quotation omitted). Slip op. at 3-5. The court went on to add that retroactive changes to the terms of an airline's frequent flyer program would constitute a breach of contract under Illinois law. Slip op. at 4.

The *Wolens* court did not discuss whether, for purposes of considering American's preemption defense, the passenger's claim for actual damages might stand on a separate footing from the claim for punitive damages, as the Ninth Circuit did in the present case. Indeed, the fact that the passenger was seeking punitive damages was cited only by the one dissenting Justice, slip op. at 8, 9, who would have held that both the statutory and common law claims are preempted under *Morales*. Slip op. at 8-11.

We respectfully submit that the *Wolens* decision, which reached

a different result on the punitive damages issue than did the court of appeals here, strengthens our argument for granting the cross-petition if the Court is inclined to grant Northwest's petition on the compensatory damages issue.

CONCLUSION

If the petition in No. 93-803 is granted, this cross-petition should also be granted.

Respectfully submitted,

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